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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1086

LUCIUS K. MACFARLANE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The *per curiam* opinion of the court of appeals (Pet. App. A) is reported at 431 F.2d 703.

JURISDICTION

The judgment of the court of appeals was entered on September 16, 1970. A petition for rehearing was denied on October 12, 1970. Mr. Justice Douglas extended the time for filing a petition for a writ of cer-

tiorari to December 11, 1970, without prejudice to the Court's consideration as to whether the application was timely filed. The petition was filed on December 11, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to sustain the verdict.
2. Whether the district court erred in various rulings.
3. Whether the prosecutor's closing argument was prejudicial.
4. Whether the probation report was unfair.

STATEMENT

After a jury trial in the United States District Court for the Central District of California, petitioner was convicted of thirty counts of mail fraud, in violation of 18 U.S.C. 1341, arising out of a scheme to obtain money from high schools across the country. On May 13, 1969, he was sentenced to concurrent prison terms of two years on each count, with eligibility for parole to be determined under 18 U.S.C. 4208(a)(2).

The evidence showed that in August, 1968, petitioner met John Thomas (T. 133),[1] who said he had conducted a sample mailing for a proposed "National

[1] "T." refers to the seven-volume transcript of proceedings before the district court, which we are lodging with the Clerk of this Court.

Scholarship Foundation" to 300 high schools, and had received a response from thirteen schools (T. 134-137). Petitioner indicated that he had previous experience in foundation and fellowship work and that he would have no difficulty in raising the necessary funds (T. 137-139, 187). Soon thereafter, petitioner took control of the program. He told Thomas that he had begun to draw up corporate papers using the name "National Scholarship Foundation" (hereinafter referred to as the "Foundation") (T. 140-142, 513). In September, Thomas gave petitioner the proceeds of the spring mailing ($325) (T. 144). About that time, petitioner told Thomas that he had a firm $250,000 commitment from the Rockefeller Foundation for the Foundation (T. 151); and that he had been advised by entertainers Bing Crosby and Pat Boone, and by Omar Bradley, Curtis LeMay and Howard Hughes that they would serve as trustees of the Foundation (T. 150-153).

In September, petitioner sought commitments of various individuals to become foundation trustees. He represented that the Foundation had substantial funds available to award scholarships (T. 295), that he had commitments for funds from the Rockefeller and Ford Foundations (T. 309-310, 358, 428), and that matching federal grants would be forthcoming (T. 359). He also suggested the possibility of getting funds from the Howard Hughes Foundation (T. 410, 428-429). One prospective trustee was told that other prominent men, such as former California Governor Goodwin Knight and several judges, were going to be trustees (Tr. 472). Acting on petitioner's representa-

tions, several of the persons approached agreed to serve as trustees (T. 290-291, 394, 470). Others indicated to petitioner that they wished to know more about the Foundation before they would agree to the use of their names as trustees (T. 279-280, 357). The Foundation received no donations other than a check for $340 and two other donations from petitioner's associates which were used to pay mailing costs. (T. 579-580, 583-585, 590, 738, 766).

On November 13, 1968, petitioner caused more than 28,000 brochures to be mailed to high schools across the United States (T. 49-54, 118). In the brochure and attachments representations were made that the Foundation had eleven responsible named trustees, and that private and corporate donors had joined to help educate America. They stated that scholarships ranging in value from $250 to $5,000 would be awarded to one out of every fifty applicants; and that the school must register prior to November 22, 1968, in order to qualify its students. A registration fee of $25.00 was sought to cover administrative expenses (see T. 967-968).[2] Several school officials

[2] Before the brochures were mailed, Thomas told petitioner that he did not wish to be associated with the Foundation any longer and that the petitioner was not authorized to use his name. Thomas resigned or was discharged by petitioner (T. 157-159, 218-219, 729). On November 12, 1968, Thomas contacted a Postal Inspector and gave information about petitioner's activities (T. 565-569). Manuel Kopelman, who had originally signed the California articles of incorporation for the Foundation (T. 441-442), advised petitioner not to make the mailing (T. 431). Trustee Bruce Blaylock also told petitioner not to make the mailing with his and Lindsay Crosby's names listed as trustees of the Foundation (T. 360, 432).

who received the mailing testified that they thought that the Foundation was similar to other National Scholarship programs and that they each sent a $25.00 check to the Foundation in order to allow their students to qualify for the Foundation's scholarships (T. 84-87, 93-96, 98-99). Postal inspectors intercepted 430 other letters, at least 225 of which had $25 checks payable to the National Scholarship Foundation (T. 522-523, 547-548).

ARGUMENT

1. Petitioner argues (Pet. 6-9) that the evidence produced against him was insufficient, since it is allegedly more consistent with a finding of good faith coupled with poor judgment than with a finding of intent to defraud. The jury, however, was carefully instructed by the trial court that petitioner's claim of good faith, if believed, would provide a complete defense to the crime of mail fraud, and that intent to defraud was a prerequisite to a finding of guilt (T. 971-972). The jury's determination of petitioner's fraudulent intent was well grounded in the evidence.

2. Petitioner's objections to various rulings by the trial court are without merit.

a. Petitioner objects (Pet. 9-16) to a ruling excluding the testimony of defense witness Kevorkian about a statement Thomas made several weeks before the meeting at which Thomas told petitioner not to make the mailing (T. 721-723). The statement was offered for the purpose of showing that it was Thomas, not petitioner, who was eager to get the mailing out. The district court properly excluded the proffered

hearsay statement, since, as defense counsel admitted, there had been no foundation laid during Thomas's cross-examination. *United States* v. *Battaglia*, 394 F. 2d 304, 317 (C.A. 7); *United States* v. *Bowe*, 360 F. 2d 1, 14-15 (C.A. 2), certiorari denied, 385 U.S. 961. In any event, the statement would not have been inconsistent with the government's case, for no attempt was made to prove that Thomas was anything less than a full participant in the scheme up to the time of his disagreement with petitioner. The excluded statement, therefore, even if admitted and true, would not have negated petitioner's eagerness to make the mailing.

b. The evidence included a folder which petitioner admitted to a postal inspector contained his entire file on the Foundation (T. 524-525). A portion of this file, Exhibit 32-D, included figures setting potential school membership at 30,000 schools at $25 per school—a possible return of $750,000 (T. 788)—and a potential student application market of one million students at $4 per student, yielding a possible $4,000,000 (T. 789). Petitioner objects to the admission of this exhibit into evidence on the basis that the evidence of its authorship was conflicting (Pet. 17-19). That objection goes to its weight, not its admissibility. Since the exhibit was found in petitioner's file on the Foundation, it was clearly relevant.

c. The complaints with respect to the conduct of the trial judge are frivolous on their face. Petitioner had testified to his intent to set up a non-profit corporation (T. 679). The trial court then made legitimate and relevant inquiry concerning petitioner's

motives and his knowledge that non-profit corporations pay salaries (T. 679; Pet. 21-22). Other questions were an inquiry into the mechanics of the proposed scholarship program (Tr. 697-700; Pet. 22-27), and into the mathematics involved in the numerical and financial return expected from the mailing (T. 706; Pet. 27-28).

Finally, the judge asked about petitioner's educational background (T. 710-711; Pet. 28-30). Defendant later objected to this questioning (T. 717-719) and asked the judge to give remedial relief. The trial judge indicated to counsel that no cynicism was intended by his questions and that he intended to instruct the jury that his questions were asked for the purpose of eliciting information that he thought was important, not to express his personal opinion, and that the jury might disregard any of his comments. Defense counsel said that that would satisfy his objection in the main (T. 719). The jury was instructed that it was not to assume from the judge's questions that he held any opinion on the matters to which they were related, and that the jury was at liberty to disregard all his comments (T. 963).

d. The claim that the trial court showed prejudice by using the term "NSF" to refer to the Foundation is without merit. Prior to the opening statements, in the course of enumerating the lengthy list of exhibits being admitted into evidence by stipulation of both parties (T. 48-60), the trial judge used the abbreviation "NSF" to characterize the longer term "National Scholarship Foundation." (T. 51-55, 59-60, 64-65). The term was used several times in the same manner

by petitioner's counsel himself (T. 67-69). Its subsequent use at two points in the lengthy and detailed instruction of the jury (T. 967, 970) was obviously only a shorthand reference.

e. Government witness Creighton testified that at a party in late October at her home, petitioner said that he had been a practicing physician for twenty years (T. 313) (see Pet. 51-54). An objection that the testimony was irrelevant was overruled, and counsel then indicated that he felt that the testimony was outside the scope of the indictment, since "[t]here is no operative document that refers to Mr. MacFarlane as an M.D. or doctor" (T. 313). There was already evidence, however, that petitioner used the title "Ph.D." (T. 201) and signed Foundation documents as "Dr. L. MacFarlane" (T. 265). In any event, in the context of the long trial and the government's proof, any error in admitting the testimony was harmless, as the court indicated.

f. Petitioner argues that the trial court abused its discretion by strictly holding defense counsel to the previously agreed limit of fifty minutes for closing argument to the jury (Pet. 34-36). This limit was agreed to by counsel as a "maximum outside limit" (T. 853). When petitioner's counsel's time expired, he was given an additional minute to finish (T. 940). The limitation was reasonable. See *Butler* v. *United States*, 317 F. 2d 249 (C.A. 8), certiorari denied *sub nom. Benedec* v. *United States*, 375 U.S. 836, and 375 U.S. 838.

3. The argument of counsel, from which petitioner has culled excerpts (Pet. 36-43), was occasionally in-

tense, but it was based on the evidence and cannot be said to have deprived the petitioner of a fair trial. See *Kowalchuk* v. *United States*, 176 F. 2d 873 (C.A. 6); *United States* v. *Hoffman*, 415 F. 2d 14 (C.A. 7), certiorari denied, 396 U.S. 958; *Isaacs* v. *United States*, 301 F. 2d 706 (C.A. 8), certiorari denied, 371 U.S. 818.

The government was justified in using the chart of which petitioner complains. The chart was a compilation of figures showing the maximum return possible from the scholarship scheme, based on the maximum number of possible schools joining the Foundation and visualizing the return on several combinations of different scholarship values (T. 882-887). The district court correctly observed that the chart was merely a mathematical representation of the government's arguments, to which the evidence was susceptible. Although the chart in part indicated the government's most extreme theory, 100 per cent participation by the schools solicited, the defense was free to point this out and argue whatever error it felt existed (T. 884-885).

4. Petitioner contends that the probation report submitted to the district court was prejudicial and that the refusal of that court to suspend sentence was an abuse of its discretion (Pet. 54). Most of the omitted information to which petitioner refers came out during the trial or at sentencing, and was thus before the district court. It is clear from the judge's comments at sentencing that other considerations than the statements contained in the probation report were paramount in his decision to deny probation. He

stated that petitioner's continued lack of candor with the court, together with the nature of the scheme perpetrated—which had a potential for defrauding high schools and their students throughout the country of large sums of money—required punishment (T. 1013-1014).

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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